Supreme Court, U.S.
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No. 94-1512

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THOMAS TRUPIANO,

Petitioner,

v.

CAPTAIN GUS & BROTHERS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Appeals Court erred in Summarily Affirming the District Court's decision that Petitioner had not proven that the Respondent was callous, willful or recalcitrant in failing to pay maintenance benefits?

LIST OF PARTIES

Petitioner, Thomas Trupiano, is an individual resident of the Commonwealth of Massachusetts.

Respondent, Captain Gus & Brothers, Inc., is a Massachusetts corporation which, at all times pertinent herein, was the owner of the F/V CAPT. GUS.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

STATUTE INVOLVED 3

STATEMENT OF THE CASE 3

SUMMARY OF THE ARGUMENT 8

REASONS FOR DENYING THE WRIT 9

I. There Is No Conflict Between The Court Of Appeals And District Court Decision And Any United States Supreme Court Decision 9

II. The First Circuit Court Of Appeals Correctly Applied *Robinson v. Pocahontas, Inc.* 12

III. There Is No Conflict Between The Court Of Appeal's Decision And The United States Court Of Appeals For The Fifth Circuit Decision In *Holmes v. J. Ray McDermott & Co., Inc.* 14

CONCLUSION 15

TABLE OF AUTHORITIES

Cases:

Cortes v. Baltimore Insular Line, 287 U.S. 367 (1932) 11

Holmes v. J. Ray McDermott & Co., Inc., 734 F.2d 1110 (5th Cir. 1984) 14

Robinson v. Pocahontas, Inc., 447 F.2d 1048 (1973) 12, 13

Trupiano v. Captain Gus & Brothers, Inc., 42 F.3d 1384 (1st Cir. 1994) 2

Vaughan v. Atkinson, 369 U.S. 527 (1962) 10, 11

Warren v. United States, 340 U.S. 523 (1951) 11, 12

Page

Statutes:

46 U.S.C. §688 *et seq.* 2

26 U.S.C. §1333. 2

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TO THE HONORABLE SUPREME COURT:

The Respondent, Captain Gus & Brothers, Inc., respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari submitted by the Petitioner, Thomas Trupiano.

OPINIONS BELOW

The suit was brought in the United States District Court for the District of Massachusetts under the Jones Act, 46 U.S.C. §688 et seq, and the admiralty jurisdiction, 26 U.S.C. §1333. By agreement of counsel, the negligence claim under the Jones Act and the unseaworthiness claim under General Maritime Law were tried to a jury and the claim for maintenance and cure benefits was reserved for a decision by the District Court. Also, by agreement of counsel, the matter was referred to United States Magistrate Judge Robert Collings for all purposes.

Based upon a stipulation of counsel entered at the jury trial that the Petitioner had not reached a medical end result, United States Magistrate Judge Collings found, after an evidentiary hearing, that Petitioner was entitled to maintenance benefits in the amount of $13,560.00. However, United States Magistrate Judge Collings found that the Petitioner had not proven that Respondent Captain Gus & Brothers, Inc. acted callous, willful, or recalcitrant in failing to pay maintenance benefits and, therefore, denied punitive damages and attorney's fees.

Petitioner appealed the punitive damages issue to the United States Court of Appeals for the First Circuit. The First Circuit summarily affirmed the judgment. *Trupiano v. Capt. Gus & Brothers, Inc.*, 42 F.3d 1384 (1st Cir. 1994). The First Circuit opinion, the Findings of Fact and Conclusions of Law of United States Magistrate Judge Collings, and the Judgment are reproduced in the Petition for Writ of Certiorari.

STATUTE INVOLVED

The issue of punitive damages for failure to pay maintenance and cure benefits is governed by General Maritime Law. It is not statutory.

STATEMENT OF THE CASE

Mr. Trupiano alleges that he was a member of the crew of the F/V CAPT. GUS when he injured his back. Petitioner did not initially make any claim or report any injury. The vessel owner's first knowledge that Mr. Trupiano was claiming an injury was four months after the alleged accident. Initial indication of a claim of injury by Mr. Trupiano was provided on February 3, 1988 when medical records were forwarded by Petitioner's counsel. The letter was addressed to Enza Rosa Corporation, a corporation which was not the owner or operator of the F/V CAPT. GUS. The reports were for treatment on December 21, 1987 and January 4, 1988 by Dr. Heisey and Dr. Cohen respectively. The report of Dr. Heisey is very vague as to the date of onset. Dr. Patel's note of December 11, 1987 indicates "that approximately three days ago, while in a boat on a fishing trip, he allegedly fell and injured the back." Further, the Beverly Hospital Emergency Room notes of December 7, 1987 indicate "No known trauma. . . ."

The matter was assigned by the vessel owner's underwriter, St. Paul Fire and Marine Insurance Company (hereafter referred to as "St. Paul") to Louis Fitzpatrick of Chadwick Services, Ltd. for investigation. Statements were obtained from crewmembers Marvin B. Wilson and Myles David Lacey. Mr. Wilson indicated that he did not witness any slip and fall accident by Petitioner. Mr. Lacey indicated that he did observe the Petitioner slip

and fall on the top of the fishhold hatch. This version is not consistent with a "slip and fall on oil on the deck." A recorded statement was also taken from Captain Robert Reed on March 16, 1988. Captain Reed indicated that he did not observe the Petitioner slip and fall on the vessel.

On March 16, 1988, Petitioner's counsel provided a copy of a medical report of Dr. Michael Wertz. That medical report indicates that Petitioner injured his back in June, 1987 while bringing a fish aboard the vessel. This now presented the vessel owner with three factual scenarios in which the Petitioner alleges he was injured. After receipt of the medical report of Dr. Wertz, the vessel owner's son, Dominic Sanfilippo, was interviewed and he vehemently denied that the Petitioner sustained any injury in June, 1987. Mr. Dominic Sanfilippo was the Captain for the June, 1987 trips.

A review of the settlement sheets for the F/V CAPT. GUS indicates that the Petitioner was employed aboard the F/V CAPT. GUS on trips number 8, 9, 10, 11, 12, 12b and 13. Those trips comprise the period from April 27, 1987 through September 21, 1987. There was also an indication in the file that the Petitioner worked in mid-November, 1987 aboard the F/V JOSEPH & LUCIA II.

By correspondence of May 26, 1988, Petitioner's counsel requested maintenance benefits at the level of $1,300.00 comprising twenty weeks of disability less the ten days the Petitioner fished aboard the F/V JOSEPH & LUCIA II.

Further compounding the situation is the fact that the Petitioner was examined by several doctors. An MRI in January, 1988 revealed "minimal mid-line herniation

at L5-S1." It further indicates that the herniation extends to the right of mid line. Dr. Cohen indicates that this is not consistent with the patient's symptoms, which were alleged to be sciata radiating to the left side. The December, 1987 report of Dr. Boswell indicates a two month history of back pain, which is inconsistent with an August/September injury.

On August 9, 1988, Michael O'Reilly, the individual at St. Paul adjusting the claim, informed Mr. Fitzpatrick that the underwriter would not pay maintenance and cure on the vessel owner's behalf at this time because it did not appear that any accident/injury occurred aboard the vessel. Mr. Sanfillippo also rejected maintenance payments based upon his understanding of the claim. An IME of the Petitioner on the vessel owner's behalf was performed by Dr. Gordon F. Lupien on October 18, 1988. Dr. Lupien was of the opinion that the Petitioner did not exhibit any objective evidence of disability and, in fact, was attempting to mislead Dr. Lupien as to the nature and extent of his disability.

On November 23, 1988, Michael O'Reailly sent a letter to the vessel owner's representative, Dominic Sanfilippo, indicating that Attorney Mech of Petitioner's counsel's office had advised him that Captain Reed had given a statement that Mr. Trupiano had reported an injury on or about August, 1987 and that the vessel's hydraulic line had burst, making the deck slippery. Based upon that alleged statement, Mr. O'Reilly recommended that the vessel owner reconsider its position concerning payment of maintenance and cure. Mr. O'Reilly additionally indicated that the vessel owner may be subject to punitive damages for failure to pay maintenance and cure benefits and that such an assessment

is not covered under the Protection and Indemnity policy.

On December 6, 1988, Thomas Frost of St. Paul sent a letter to Petitioner's counsel requesting additional information that Mr. Trupiano was injured aboard the F/V CAPT. GUS. Counsel had previously indicated that he would forward a copy of the statement of Captain Reed. However, apparently Petitioner's counsel did not have such a statement and merely forwarded a letter which indicated that Captain Reed *had told him* that an injury had been reported. The transcribed statement of Captain Reed taken previously by Mr. Fitzpatrick is inconsistent with the alleged statement of Captain Reed to Petitioner's counsel.

Upon receipt of such information, Mr. Fitzpatrick again interviewed Captain Reed. He again indicated that he could not recall any injury being reported to him. However, Captain Reed did indicate that a fellow crewmember, Alan Pollock, had indicated that Petitioner reported the injury to Captain Reed at the time it happened.

Mr. Sanfillippo continued to maintain that the Petitioner was not injured while a member of the crew of the F/V CAPT. GUS. Mr. Thomas Frost of St. Paul sent a letter to Mr. Sanfillippo on December 22, 1988, again requesting a reconsideration of payment of maintenance and cure and that any assessment of punitive damages would not be covered under the policy.

In March, 1989, Michael O'Reilly resumed adjusting the claim on behalf of St. Paul Fire and Marine Insurance Company. On March 16, 1989, he conferred with Petitioner's counsel concerning maintenance and cure benefits. The recorded notes from that conversation indicate

that Petitioner's counsel was advised that the vessel owner did not want to pay any maintenance and cure benefits because it did not believe the injury occurred aboard the F/V CAPT. GUS.

On March 22, 1989, Petitioner filed suit. The initial suit was against Enza Rosa Corporation, an improperly named party. On January 30, 1990, Petitioner's counsel filed a Motion to Amend the Complaint to correct the name of the defendant to Capt. Gus & Brothers, Inc. The motion was allowed by District Judge Woodlock on July 24, 1990.

On September 11, 1990, Wyndell Hunt took over the investigation and adjusting of this claim for St. Paul. On November 30, 1990, a certified letter was sent by Wyndell Hunt to Mr. Sanfillippo, requesting instructions as to the payment of maintenance and cure benefits. On February 4, 1991, Mr. Hunt conferred with Domenic Sanfilippo, and payment of maintenance and cure was authorized if St. Paul Fire and Marine Insurance Company believed it was necessary or proper. On February 19, 1991, Mr. Hunt conferred with his superior, Philip Broderick of St. Paul, and a decision was made not to pay maintenance and cure benefits because it did not appear that Mr. Trupiano was injured on the vessel. This decision was upon the following bases:

1) Conflicting reports of injury;

2) The statement of Captain Reed that he did not recall being informed of any injury;

3) The failure of counsel to provide the indicated statement of Captain Reed;

4) The statements of the crewmembers indicating an alleged slip and fall incident inconsistent with the version of the alleged injury by the Petitioner;

5) The fact that the Petitioner waited three to four months before seeking medical attention;

6) The IME report indicating that the Petitioner did not exhibit any signs of injury; and

7) The opinion by Dr. Lupien that the Petitioner was attempting to improperly influence his opinion.

A second physical examination of Petitioner was performed on February 26, 1992 by Dr. Lupien. Dr. Lupien again rendered an opinion that the Petitioner did not indicate any evidence of anatomical derangement or structural lesion sustained during 1987 and that the Petitioner does not show any indication of any residual, physical impairment or loss of physical function which can be attributed to any incident during 1987.

SUMMARY OF ARGUMENT

Respondent Captain Gus & Brothers, Inc., respectfully urges that the Petition for Writ of Certiorari be denied. This case presents no issue appropriate for this Honorable Court's exercise of its discretionary function. Although Petitioner alleges a conflict between the decision herein and precedents in the First and Fifth Circuit Courts of Appeal and the United States Supreme Court, there is no such conflict.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS AND DISTRICT COURT DECISION AND ANY UNITED STATES SUPREME COURT DECISION.

Petitioner maintains that there is a conflict between the decision of the Court of Appeals and the District Court and United States Supreme Court precedent. Petitioner never identifies the conflict or in what way the decision herein failed to comply with the constrictures of this Honorable Court.

Respondent initially notes that the Petitioner has grossly misstated the facts as found by United States Magistrate Judge Collings. In his Petition for Writ of Certiorari, Petitioner states "The plaintiff presented overwhelming medical and factual evidence to the defendant. This evidence clearly proved that the plaintiff had been injured in the service of this vessel." In fact, the complete opposite was found by United States Magistrate Judge Collings. The Findings of Fact and Conclusions of Law of United States Magistrate Judge Collings painstakingly and meticulously examined the evidence presented at the Trial and the further evidentiary hearing, noting the numerous factual discrepancies and the thoroughness of the vessel owner's investigation. United States Magistrate Judge Collings made a Conclusion of Law that:

> . . . First, unlike the shipowner in the *Vaughan* case, the mover herein conducted as thorough an investigation as was possible. All medical records were collected and all crew members who were found were interviewed. Second, the effort to investigate the claim thoroughly was ongoing over an extended period; there was no recalcitrance.

> Third, the denial was based on information which, in fact, raised serious doubts whether any injury to the plaintiff occurred in August or September, 1987 and, if so, whether the injury occurred on defendant's vessel.

Petition Brief at p. A-31-32.

These findings were not disturbed by the First Circuit, which noted that "Given that burden, given the conflicting nature of the evidence, given the gaps in the available information that existed up to the time of trial, and given, especially, the deferential standard of review that pertains, . . . we cannot say that the District Court clearly erred . . ." Petitioner Brief at p. A-3-4. Respondent notes further factual misstatements at page 4-5 of Petitioner's brief where it is stated that "during a telephone conversation, it was agreed that maintenance would be paid upon receipt of information concerning the statement of Charles Reed." There is no support in the record for that allegation. Lastly, it must be noted that the Petitioner's recitation of the facts completely ignores the crucial evidence in the determination of this claim: The investigation by the vessel owner, the findings, the continuing attempts to verify the claim, and the careful attention paid to the matter at all times. These are the factors looked to in deciding whether the Petitioner was callous, willful or recalcitrant.

Petitioner only cites to two United States Supreme Court decisions, neither of which are in conflict with the decision herein. In *Vaughan v. Atkinson,* 369 U.S. 527, 1962), the plaintiff in that case served for four months aboard a vessel owned by American Waterways Corp. He was discharged on termination of the voyage. Five days later, he reported to the United States Public Health Service Hospital for examination and was treated

for suspected tuberculosis. The only investigation conducted by the vessel owner was to obtain a statement from the master and chief engineer. Both officers indicated that Mr. Vaughan never complained of any illness during his four month service. The United States Supreme Court, per Mr. Justice Douglas, stated:

> In the instant case respondents were callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that recalcitrance, libellant was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old. The default was willful and persistent. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one.

In *Vaughan v. Atkinson,* 369 U.S. 527 (1962), the United States Supreme Court noted that the failure to pay maintenance and cure may give rise to compensatory damages for injuries to the seaman which result from that failure. *Id.* at 533-34. Additionally, such recovery "may also include necessary expenses." *Id.* at 530 (quoting *Cortes v. Baltimore Insular Line,* 287 U.S. 367, 371 (1932). The United States Supreme Court then stated that since the defendant was recalcitrant in refusing to pay maintenance and cure, the plaintiff therein was "forced to hire a lawyer and go to court to get what was plainly owed him." *Id.* at 531. The *Vaughan* Court concluded: "It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one." *Id.* The District Court and First Circuit both referred to *Vaughan* and correctly applied its constrictures.

The other case referred to by the Petitioner is *Warren v. United States,* 340 U.S. 523 (1951). That case is

totally inappropriate to the issues herein. The *Warren* case did not have any discussion of punitive damages for callous, willful or recalcitrant failure to pay maintenance and cure benefits. The issue in *Warren* concerned entitlement to maintenance and cure benefits in the first instance. Mr. Warren was injured on shore leave, allegedly because of his own drunkenness. Prior case law had suggested that drunkenness constituted willful misbehavior, negating the entitlement to maintenance and cure benefits. Punitive damages for failure to pay maintenance and cure benefits was not discussed and was not an issue in the litigation.

Thus, Petitioner has not pointed to any conflict with any Supreme Court decision sufficient to mandate this Honorable Court granting the Writ of Certiorari. See Rule 10.1(c) of the Rules of the Supreme Court.

II.

THE FIRST CIRCUIT COURT OF APPEALS CORRECTLY APPLIED *ROBINSON v. POCAHONTAS, INC.*

Petitioner alleges that the decision herein is not consistent with the First Circuit's opinion in *Robinson v. Pocahontas, Inc.*, 447 F.2d 1058 (1st Cir. 1973). Respondent initially notes that a conflict between opinions of the same circuit is not a valid reason for granting a Writ of Certiorari. Such a conflict is more properly addressed by a motion for hearing *en banc*, which was not sought. The only possible basis for supporting the granting of the Writ of Certiorari herein is under Rule 10.1(a) on the basis the First Circuit "has so far departed from the accepted and usual course of judicial proceedings." There is no such factor alleged in the Petition for Writ of Certiorari.

Robinson held that in order to justify punitive damages, the vessel owner's action must be callous, willful or recalcitrant.

The court in *Robinson* based its affirmance of the punitive damages award on the fact that the vessel owner therein initially used a pretext to withhold maintenance and cure payments, refused to pay when notified of the impending mortgage foreclosure, and terminated all maintenance payments after the refusal of the settlement offer. *Robinson,* 477 F.2d at 1052. None of the factors are present in the case at bar. The District Court carefully detailed all the steps taken by the vessel owner and its underwriter to ascertain entitlement of the Petitioner to the maintenance and cure benefits. The District Court noted that:

> . . . All medical records were collected and all crewmembers who were found were interviewed. Second, the effort to investigate the claim thoroughly was ongoing over an extended period; there was no recalcitrance. Third, the denial was based on information which, in fact, raised serious doubts whether any injury to the plaintiff occurred in August or September, 1987 and if so, whether the injury occurred on defendant's vessel.

The District Court went on to note "the information upon which the insurer relied in denying the claim was substantial."

Both the District Court and the First Circuit correctly cited the standard set by *Robinson* and applied the facts herein to that standard. Petitioner's argument, therefore, is that he does not agree with the Findings of Fact and Conclusion of Law as applied. This is not a sufficient basis for granting a Writ of Certiorari.

III.

THERE IS NO CONFLICT BETWEEN THE COURT OF APPEAL'S DECISION AND THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DECISION IN *HOLMES v. J. RAY McDERMOTT & CO., INC.*

Lastly, Petitioner maintans that the decision herein by the District Court and the First Circuit conflicts with the decision of the Fifth Circuit in *Holmes v. J. Ray McDermott & Co., Inc.*, 734 F.2d 1110 (5th Cir. 1984).

In *Holmes,* there was no question that Mr. Holmes was injured aboard the barge. The issue in *Holmes* was whether maintenance and cure benefits should have been reinstated after receipt of substantiating medical records. *Id.* at 1119. In the case at bar, the initial decision not to pay maintenance and cure was due to a lack of evidence that the Petitioner was injured aboard the F/V CAPT. GUS. Further investigation did not support an injury aboard the F/V CAPT. GUS. The District Court made a finding of fact that the insurer:

> decided not to pay maintenance and cure because it did not appear that Mr. Trupinao [sic] was injured on the insured's vessel. That decision was based on the inconsistencies respecting the date of the injury, the medical documentation, the work history after the alleged injury, and the statements of the crewmembers.

Regardless of what Petitioner's medical condition was, if he was not injured in the service of the F/V CAPT. GUS, he would not be entitled to maintenance and cure benefits. The evidence is clear that the denial of maintenance and cure benefits was based on the lack of factual support that the Petitioner was injured aboard the vessel. Thus, the decision herein does not conflict with the Fifth Circuit decision in *Holmes,* and is, in fact, entirely consistent.

CONCLUSION

For all of the foregoing reasons, Respondent Captain Gus & Brothers, Inc. respectfully urges this Honorable Court that the Petition for a Writ of Certiorari be denied.

By its attorneys,

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